PREPARED STATEMENT OF LAURENCE H. TRIBE
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF SAMUEL ALITO
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

January 12, 2006

My name is Laurence Tribe. I am the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard, where I have taught since completing my clerkship with Justice Potter Stewart in 1968. I have written a number of widely cited books and articles dealing with the U.S. Constitution and its interpretation, with the role of the U.S. Supreme Court, and with the Senate's role in the confirmation process. I have received a number of honorary degrees and teaching and other awards and have been elected a Fellow of the American Academy of Arts and Sciences.

I have tried to develop a practical as well as theoretical appreciation of the legal process through involvement in the work both of courts and of legislatures. On the judicial side, I have argued approximately 50 appellate cases in the state and federal courts, roughly six-tenths of them successfully (and more than half of them pro bono), including 33 cases in the United States Supreme Court. On the legislative side, I have been able to accept 42 of the approximately 90 invitations I have received from congressional committees, including this Committee, to testify as a constitutional expert.

I have agreed only twice to testify on the confirmation of a Supreme Court Justice,[1] and it is a great honor for me to do so again today.[2]

The fact that this Committee's rules require that my prepared statement be submitted by this evening, in all likelihood before the questioning of the nominee will have begun, of course requires most of what I say here to be tentative and accompanied with the usual caveats. That said, the nominee's testimony will have to be understood and its implications evaluated not as though it were burned onto a blank CD to be evaluated on its own, but against an extensive backdrop of information about the nominee's constitutional views — a backdrop of extraordinary depth and detail. In contrast to the situation with a "stealth" nominee who has a mostly blank public record with respect to the Constitution and its application, all of us have had an opportunity to learn a great deal about this nominee's approach to constitutional issues.

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[1] Just over 18 years ago (Dec. 12, 1997), I testified in favor of President Reagan's nomination of Anthony Kennedy to be a Supreme Court Justice, to the unconcealed consternation of many of my liberal friends. I was especially glad to be able to testify on then-Judge Kennedy's behalf because, several months earlier (Sept. 22, 1987), I had reached the reluctant conclusion that moving the Court's composite view of the law toward the judicial philosophy of Judge Robert Bork, who had been President Reagan's first choice for the seat vacated by Justice Lewis Powell, would jeopardize what I thought were profoundly important constitutional principles —principles neither "conservative" nor "liberal" in slant but genuinely constitutive of our character as a republic.

[2] Although I did not testify on either occasion, I did publicly support the nominations of Justice Sandra Day O'Connor by President Reagan and of Chief Justice John Roberts by President Bush. As evidence of open-mindedness toward Republican nominees, my support of Roberts may prove relatively little: he was a student in my introductory constitutional law course in the fall of 1977, and the pleasure of seeing one's former student rise so far can't be entirely ruled out as a contributing motive.

Little purpose would be served by my detailing, and describing the likely implications of, each one of the many illuminating documents we have all seen or at least heard discussed — including:

- briefs and legal memoranda that, either contemporaneously or within several years of their submission, the nominee boldly endorsed as not simply reflecting the views of a client or of a superior, but as expressing *long and deeply-held views of his own;*

- the transcript of remarks by the nominee in 1989 praising Justice Scalia's dissent in ***Morrison v. Olson***, the independent counsel case, in a speech delivered to the Federalist Society not long before the nominee became a judge on the Third Circuit, and the transcript of more extended remarks by the nominee in 2000 explaining the grounds of his agreement with the Scalia version of the "unitary executive" theory that the Court had rejected in ***Morrison***, in another speech to the Federalist Society, this one delivered when he was already a judge on the Third Circuit (ten days, as it happened, after George W. Bush had declared victory in the presidential election against Al Gore, and just under a month before the Supreme Court finally ruled 5-4 in favor of then Governor Bush); and

- a refreshingly candid set of answers to questions put to the nominee in a federal job application that closed with the reminder that deliberate misstatements are federal felonies (18 U.S.C. § 1001)

The implications of what we know on the basis of this material remain to be explored. But implications ***for what***? For the probability that, because it was the opportunity someday to dismantle the Warren Court's reapportionment and criminal justice revolutions that motivated Samuel Alito to go to law school, he will one day vote to overturn the principle of "one person, one vote"[3] or the holding that any criminal defendant too poor to afford an attorney must be assigned trial counsel at public expense?[4] Of course not. The professional and cultural constraints within which judges operate put some things altogether beyond the pale even if they had once been lively topics of discourse. But unless there is a credible account of some transformation the nominee underwent since the early 1970s that would give him a fundamentally different perspective, it would be a fair conclusion that a Justice Alito would react to the 21st century analogue of those 1960s precedents in a spirit parallel to the one that inspired him to enter the law. And any such account would have to recognize the nominee's decision in November 1985 to feature his disagreement with those Warren Court precedents, however deeply embedded by that time in the American culture, in his application to become Deputy Assistant Attorney General in the Meese Justice Department.

[3] See Reynolds v. Sims, 377 U.S. 533 (1964).
[4] See Gideon v. Wainwright, 372 U.S. 335 (1963).

Are we to pursue the implications of Samuel Alito's 1985 statement, in that job application when he was, after all, no callow youth but Assistant to the Solicitor General, that "the Constitution does not protect a right to an abortion" for the probability that he will at some point provide a fifth vote to overturn ***Roe v. Wade***[5]? Such a holding, which could well trigger a political firestorm, would in a single blow replace **Planned Parenthood of Pennsylvania v. Casey**[6], the current iteration of **Roe,** with a rule that, thenceforth, every state legislature as well as Congress, each acting within the bounds of its reserved or enumerated powers, would be free to decide for itself when, in the course of fetal development from conception to delivery, a fetus should be recognized by law as a ***human being*** whose interest in survival trumps the "liberty" of the woman to end her pregnancy.[7] I think we can say with confidence that that's *not* going to be the way a woman's reproductive freedom will be cut back and the interests of the unborn upgraded.

Realistically, the fearsome prospect for those who champion choice, and the hopeful prospect for those who would rule out the choice of abortion, is that ***Roe v. Wade*** will die not with a bang but a whimper, its essence eroded step by relatively inconspicuous step. And no-one who has read Judge Alito's statements on the subject can have any real doubt about the approach he would follow. There is no reason to anticipate that his approach would reflect anything other than his carefully considered 1985 statement that, in his view, the Constitution simply does not protect a woman's right

[5] 410 U.S. 113 (1973).
[6] 505 U.S. 833 (1992).
[7] If Roe and Casey were overruled on the basis that a woman's interest in determining for herself whether to carry a pregnancy to term may be overcome not only by a state interest in protecting a "person" but by *any* state interest that is not otherwise impermissible and that is rationally advanced by the state's challenged rule.

to terminate her pregnancy rather than giving birth to a child, but that the best way to achieve the long-term goal of permitting government to end abortion altogether[8] is to be patient and to proceed with lawyerly care, even when one's colleagues and superiors in the Justice Department insist on asking the Court to overturn ***Roe*** all at once.

If the only question each Senator had to decide was whether Judge Alito is, to quote an op-ed that my colleague Charles Fried wrote very recently, "not a lawless zealot but a careful lawyer with the professionalism to give legally sound but unwelcome advice,"[9] then *of course* Judge Alito would pass with flying colors. For of course Samuel Alito is no "lawless zealot," no results-driven ideologue who cares only about the outcome of a case and not at all about the legal path that gets him there or about what precedent he is helping to establish. In Samuel Alito's role as a circuit court judge, it is no surprise that he has proceeded conscientiously and judiciously, listening politely to both sides and to the other judges serving with him on the panel and winning the admiration of those colleagues, some of whom are testifying as witnesses for his character, even as his starting premises and his thought processes bring him, with remarkable frequency, to the conclusion closest to the right end of the spectrum within the constraints of binding Supreme Court precedent..

When those constraints are lifted, as they would be if Judge Alito were to become Justice Alito, there is every reason to expect that he would live up to the expectations that

[8] There is an even more radical possibility — namely, that government *must* outlaw abortion, at least if it outlaws infanticide.
[9] The New York Times, January 3, 2006, at A19.

the President and the President's ideological base have for him. But even if we were to suspend disbelief and allow ourselves to imagine that relaxing the constraint of binding higher court precedent and the discipline imposed by that higher court's constant presence might somehow move the nominee away from some of his long-held positions, the question for each Senator is not just how professionally and capably the nominee would discharge his functions, but how big a risk the Senator is prepared to take with the Constitution — and to impose on his or her constituents — that what you see is what you get, and that the picture the nominee painted of himself when seeking a job in Ed Meese's Justice Department is the portrait that would one day hang in the halls of the Supreme Court.

The situation is very different, then, if each Senator must decide not only whether the nominee is "qualified" and has the requisite character and integrity, but also whether that Senator is willing to help effectuate, not hypothetically but in real life, Judge Alito's approach to the gradual erosion of a long-recognized liberty — an approach that bypasses the fanfare and drama of repeatedly testing the strength of the pro-choice forces by running a battering ram ,against their leading precedent but that seems much more likely to succeed in the long run. And for any given Senator, the answer to this more profound question will necessarily depend on that Senator's views about what the constitutional status of the fetus should be; what weight to attach to the circumstance that compelling a woman to remain pregnant against her will, even if the fetus were deemed a person, entails an extraordinary (and, in American law, probably unique) bodily imposition — one that commandeers the woman's body only for the limited duration of her pregnancy

but her mental and emotional life permanently; how to deal with the father's interest in the unborn life he played a crucial role in creating; what to make of arguments, like many that are sprinkled throughout Judge Alito's judicial and other writings, that would freeze the scope and shape of constitutionally protected liberty into the mold defined by their historical status; whether it is enough to protect that earlier version of liberty from new and previously unimagined technological or other threats, or whether the Constitution's very *notions* of "liberty" and "equal protection" should be understood to evolve as well when global experience with assaults on human dignity is absorbed into the culture, and when social and political movements both here and abroad., and other bottom-up rather than top-down sources of change in what words mean and how they may be used, open our eyes to previously overlooked possibilities; whether the constitutional calculus affecting who has power to decide should take into account the religious character of many of the arguments advanced; and probably a lot else.

And the question is broader than the nominee's views of this *particular* constitutional right, important though that right is, and broader than the nominee's stepwise strategy for chipping away at that right. For Judge Alito's reasoning extends not only to reproductive liberty and equality but to the ideal of equal liberty against government incursion whenever the particular facet of liberty at issue is not specifically addressed in the Bill of Rights — unlike, for instance, the specifically enumerated freedoms of speech, press, peaceful assembly, petitioning the government, and exercising one's religious faith. Is the nominee's basic approach to the Constitution one that sees government power as presumptively legitimate everywhere except where islands of

refuge are carved out in so many words for the .individua — or is it instead an approach that sees government power over individuals as exceptional and ordinarily in need of justification, with the matter of what *counts* as a sufficient justification depending on the role of the individual right at issue in the system of rights and duties, private and public, that constitute the legal landscape. The first vision contemplates a sea of state power that covers the globe except when the constitutional text decrees otherwise in sufficiently specific terms to be readily enforceable. The second vision contemplates a sea of personal rights that equally circumnavigates the globe except when government is authorized to act against a particular right for a particular set of reasons.

Disputes about frozen embryos, stem cell research, therapeutic and reproductive cloning, the use of human genetic material in non-human animals in order to perform research said to be vital in acquiring disease-preventing strategies, the uses of artificial intelligence, wide-ranging electronic surveillance to protect the public from terrorist attack, and any number of other subjects of controversy may present constitutional problems in which the challenge is not merely to ponder the Constitution's language and the evidence of its meaning at the time of its adoption but to ask broader questions about the newly asserted right.

To those who object that deciding about such matters partakes of lawmaking, beyond the purview of a court, the answer is surely to draw a basic distinction between the policy choices involved in deciding which possibilities to pursue and at what cost, choices that are assuredly legislative in character, and the interpretive process of deciding

what constitutional rights, if any, various policy choices might endanger and thereby to define the boundaries within which policy choices will have to be made. And to people who think that making decisions about textually unspecified constitutional rights is beyond any court's purview because such decisions cannot take the form of objectively and dispassionately "finding" the governing law and then simply applying it, I think the answer is that courts at the apex of any judicial pyramid charged with the power to resolve disputes over the meaning of the system's legal regime to the resolution of live controversies must of necessity engage in this constructive process of *articulating* the law and not merely *finding* it, as though it were there to be discovered by those who look hard enough.

It is surprising to me how often the colloquies in a hearing like this one end up going around in circles about whether the nominee will just "find" the law or will actively seek to remake it in his own image. It's worth recalling that the subject of this hearing, Samuel Alito, certainly had no illusions about the degree to which adjudication, at least in the highest court of any given system, compels the judge to make choices that cannot be said to have been dictated by the relevant precedents and other legal materials. When just a Princeton undergraduate, Alito described as illusory the idea that a judge of a constitutional court can operate as a merely "disinterested finder of law," although he recognized that what he called "the myth of the judge as automaton" had yet to be as profoundly eroded elsewhere as it had in America. Id. [10]

[10] The comparison was with Italy in Alito's 138-page senior thesis, "An Introduction to the Italian Constitutional Court."

That's why it's not a cause for alarm that two different judges, each honest and capable and even distinguished, might come out differently in a complex constitutional controversy or, for that matter, that the court on which Samuel Alito hopes to sit often divides 5-4 on major questions — a fact of some significance in light of how often the decisive vote in these close divisions was cast by Justice Sandra Day O'Connor, whom Alito would replace.

It is customary to subdivide the Constitution's territory into one region dealing, with individual rights against various levels of government; a second region dealing with the vertical division of power between the central, or national, government and the individual states; and a third region dealing with the horizontal separation of powers among the three branches of the national government — the legislative, the executive, and the judicial. But the division of what is ultimately a single, multiply interconnected continent can be highly misleading. The checks and balances that are our system's genius indirectly secure the individual rights that are its reason for being. Restrictions on the power of Congress to protect those individual rights through the enforcement clauses of the Civil War amendments — restrictions more severe, in Judge Alito's Third Circuit jurisprudence, than even the Rehnquist Court was to approve a short time later (in the context of family leave) — may weaken Congress as an institution, at the same time that institutional arrangements of the sort that Judge Alito has either proposed or supported as devices for strengthening the presidency — such as the institution of the presidential signing statement designed, as explained in a draft memorandum of Feb.5, 1986, by Deputy Assistant Attorney General Alito (Office of Legal Counsel), to give the President

"the last word on questions of interpretation;" or the institution of absolute immunity for the Attorney General from liability for monetary damages for carrying out a program of warrantless domestic electronic eavesdropping in violation of the Foreign Intelligence Surveillance Act of 1978 ("FISA") and of "clearly established legal standards" thereunder, which Assistant to the Solicitor General Alito, in a memorandum to the Solicitor General dated June 12, 1984, endorsed (the immunity, not the illegal surveillance!)[11]but which he urged the Solicitor General not to press by seeking certiorari on any issue other than the appealability of the rejection of a claim of qualified immunity, reasoning that the government's chances of "persuading the Court to accept an absolute immunity argument would probably be improved in a case involving a less controversial official and a less controversial era."[12]

Just as the Senate and the public may be diverted from the real issues in a confirmation battle by using the fakeout or decoy in the form of a straw man with high symbolic salience — "will he vote to overrule **Roe ?"** —to deflect attention from its more likely gradual erosion, for instance, so another technique for obscuring what is potentially at stake is that built on the game of "divide and conquer," in which individual pieces of information about the nominee's approach are viewed in isolation from each other, with no attempt to ask whether connecting the dots might form a pattern, or might reveal a whole greater than the sum of its parts. Thus, of the Alito wiretap immunity memorandum, it will doubtless be said, despite the timeliness of the issue as the legality

[11] The quotations are taken from pp. 5 and 6 of the memorandum.
[12] Id. at 6. The case was Forsyth v. Kleindienst, No. 82-1812 (CA3, March 8, 1968). The Supreme Court ultimately rejected the claim of absolute immunity but held qualified immunity available. Mitchell v. Forsyth, 472 U.S. 511 (1985).

of the President's secret program of unchecked and warrantless surveillance comes under increasingly intense challenge, that Samuel Alito did, in the end, recommend *against* taking the immunity claim to the Supreme Court at that time and that, in any event, the absolute immunity position was standard stuff in the Solicitor General's Office of even the Carter Presidency under Solicitor General Wade McCree. And, of the Alito draft memorandum on presidential signing statements, it will presumably be said that the nominee was simply making the best arguments he could for what he plainly regarded as a rather far-out experiment — one that no-one could at the time have imagined blossoming into the potent and nearly ubiquitous tool it has recently become, particularly as a tool for asserting presidential prerogatives, with just 75 signing statements asserting some prerogative of the president having been issued from the Monroe administration to the Carter administration but with 247 such statements being issued by Presidents Carter and Reagan alone, typically to assert the prerogative of the president directly to supervise the "unitary executive branch," to impose a uniform presidential interpretation of each of a law's terms upon that "unitary executive branch" — the phrase has become such a favorite in the Bush presidency that the President has used it nearly 100 times since assuming office, frequently several times on the same page — and to resist the imposition by Congress of reporting and other duties on subordinate executive officials. Although the development obviously postdates Samuel Alito's association with the signing document as a simple idea, the President has more and more brazenly used the device essentially to undo in the Oval Office a complex compromise worked out between The White House, the House, the Senate, and the Joint Conferees. Precisely that occurred on December 30, 2005, when the President included a statement upon the signing of H.R.

2863, a D.O.D. supplemental appropriation to address hurricanes in the Gulf of Mexico and the Pandemic Influenza Act of 2006, Title X of which represented the Graham-Levin amendment to the McCain compromise on the matter of cruel and inhumane treatment of detainees. The signing statement said that the "executive branch shall construe Title X . . . of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks."

Obviously, one cannot treat Judge Alito as if he had engineered this dramatic rise in the use of the presidential signing statement or its potent fusion with the "unitary executive" idea carried by the current administration to a barely believable extreme, in a climate increasingly dominated by a presidential assertion that, for all practical purposes, in the open-ended war on terror, the President either is *above* the law, or the President *is* the law, at least in areas that the President deems to involve the conduct of foreign policy or a matter of national security. Because the subject of this hearing is Judge Alito, not the Bush presidency, this is not the place for a detailed exploration of how the present situation went as far as it did before anyone blew the whistle. Suffice it to recall Justice Jackson's sober reminder, concurring in the Steel Seizure case, that, "[w]ith all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law

be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up."[13]

Having said that, of course, Judge Alito cannot be held accountable for what the Bush administration has done with the "unitary executive" theory coupled with devices like the signing statement, it remains to note that the Office of Legal Counsel during the years 1986-90, with Samuel Alito as the Deputy Assistant Attorney General in that Office, was a hotbed of ideas all centered on the idea of enhancing the powers of the presidential office, acting through the President himself or at least under his strict hierarchical direction, both over the unruly and stubborn bureaucracy and over the military and foreign policy and national security initiatives of the administration. It was during that period, and from that office, that the Alito "signing statement" memorandum sprang. It was also at that time that the Office of Legal Counsel issued the innocuously named 1986 OLC "Timely Notification" opinion, THE PRESIDENT'S COMPLIANCE WITH THE "TIMELY NOTIFICATION" REQUIREMENT OF SECTION 501(b) OF THE NATIONAL SECURITY ACT, 10 Op. OLC 159 (1986). A statute requires the Executive to give prior notice of covert intelligence activities to eight members of Congress and post-conduct notice to the intelligence committees "in a timely fashion." President Reagan gave no prior notice of the Iran-Contra affair to anyone in Congress and delayed any post-conduct disclosure on a discretionary basis. The OLC opinion concluded that the statute was complied with. That was remarkable in itself, but far more remarkable was the lengthy accompanying report and its assertion (pp. 161-62) that

[13] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952)(Jackson, J., concurring).

Congress simply has no authority "in the area of foreign affairs" that does not "directly involve the exercise of legal authority over American citizens." Such a view would, among many other unthinkable consequences, make all immigration laws impermissible usurpations of Executive power. And the entire construct is but a horizontal slice, linking the Executive to the outside world, of a unified theory that in its vertical slice is the familiar "unitary executive" idea applied to hierarchical supervision. Samuel Alito was one of just three deputies in the OLC at the time, and it would be interesting to know what role he played in the writing or vetting of that memo.

Although the "unitary executive" theory's most enthusiastic and industrious exponents, Christopher Yoo and Steven Calabresi, have written a massive, four-part online article purporting to show that the central elements of the unitary executive idea either were present in every administration from that of George Washington to that of George W. Bush or were suppressed in an era when the President did not acquiesce in the resulting stripping of his powers, but for all practical purposes, as a rallying point and a rhetorical battle cry, the theory had its incubation period in the heady OLC days of 1986-90 and erupted to the surface in the solo dissent of Justice Scalia in ***Morrison v. Olson,***[14] which relied on a potpourri of text, structure, history, with a heavy dash of political theory and citation from the Massachusetts Constitution of 1780, to invoke a thesis that all executive functions, both those enumerated in Article II, Sections 2 and 3, and those residual or inherent powers that are intrinsically executive — itself a nebulous category whose provenance is dubious and whose existence is conjectural — must be performed

[14] 487 U.S. 654, 697 (1988).

by officials politically accountable to, and thus removable without cause by, the President[15]. It was the Scalia formulation and application of the theory, liberating the President from the specter of an independent check on self-dealing or corruption close to the President, that went to the home of the enemy, as it were, by applying the theory in the one quintessential circumstance in which there is a powerful functional reason for for creating a significant degree of independence from the President being investigated. If the theory trumps any and all power in Congress to structure investigations and prosecutions of the Executive Office of the President and the West Wing, then it trumps virtually everything even without the extravagant theory of the OLC Opinion stripping Congress of foreign affairs powers except with respect to U.S. citizens.

The climax of this story, as everyone will by now have figured out, is that it was this Scalia formulation of the unitary executive thesis then private citizen Samuel Alito described as a "brilliant but very lonely dissent"[16] that rightly, according to Mr. Alito, charged the impressionistic test formulated by Chief Justice Rehnquist for the majority with being "not analysis" but "ad hoc judgment." Nor did Alito become reconciled to the mushy majority opinion after becoming a judge. On the contrary, after winning appointment to the Third Circuit, Judge Alito spoke at a Federalist Society symposium on administrative law, which he said brought "back so many fond memories of [his] days in the Office of Legal Counsel, back in the 1980s." Reminiscing about the good old days, the judge said "We were strong prponents of the theory of the unitary executive, that all

[15] Sometimes the theory is thought to require also that the President be able to reach into every such executive agency and compel it to do what he deems wise, but that is not invariably a feaure of the theory.
[16] "Debate – After the Independent Counsel Decision: Is Separation of Powers Dead?"26 AM. CRIM. L. REV. 1667 (1989).

federal executive power is vested by the Constitution in the President."[17] The judge said that he "thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."[18] Judge Alito then proceeds to draw a dramatically simplified sketch of the "three types of federal governmental power," asserting that there can be only those three because no others are mentioned and offering an account that, as far as I have been able to determine, has almost no roots either in the history of the founding or in the immediate post-ratification history or in the more recent history.[19] This isn't to say that the presidency has not grown vastly stronger in the years since the Cold War, with major consolidations of power in the administrations of George H.W. Bush, Bill Clinton, and now George W. Bush; it has. But the techniques of hierarchical consolidation, in the vacuum created by congressional silence as to an agency's independence, have involved a mix of bold presidential directives to the agency heads at the front end of an undertaking, requirements that the agencies perform and display the results of various cost/benefit analyses, direct fiscal pressures, and presidential statements "owning" the results of agency action. In her landmark study of the phenomenon, Dean Elena Kagan spells out these devices in great detail.[20] Combining the results of her research with those of the research done by Lessig and Sunstein, which reveals, among other things, that the very notions of "executive" and non-executive actions were different for the founding generation and that categories like "administration" had altogether meanings as well, it's hard not to conclude that the "unitary executive" theory

[17] Administrative Law & Regulation: Presidential Oversight and the Administrative State, reprinted in 2 ENGAGE 11, 12 (Nov. 2001). Although the publication is dated Nov. 2001,
[18] Id.
[19] For an elaborate and subtle study, see Lawrence Lessig and Cass Sunstein, "The President and the Administration," 94 COLUMB. L. REV. 1 (1994).
[20] "Presidential Administration," 114 HARV. L. REV. 2245 (2001).

is a gerry-rigged contraption cooked up with straightedge and scissors by people who had read the Constitution's text and certain canonical Fedderalist Papers but little else on the subject. That would certainly account for the repetitive use of the same few sources and phrases, such as Justice Scalia's statement that the clause vesting "the executive Power . . . in a President of the United States" "does not mean *some of* the executive power, but *all of* the executive power," 487 U.S. at 654 (dissenting opinion), and Judge Alito's statement to the Federalist Society in November 2000 that "the Pfresident has not just some executive power, but *the executive power* — the whole thing."[21] There follow the same (often patently fallacious) textual and structural arguments, the same failure to confront linguistic anomalies created by the theory, and the same invocation of the functional arguments about "energy," "accountability," and a reduction in "dissention," many of which actually address the framers' choice to have a singular rather than a plural presidency and not any question about congressional power under the Necessary and Proper Clause to structure the lines of authority within the bureaucracy or any question about the breadth of executive authority to act in the absence of statute in wartime or of executive authority to act in the face of statutory prohibition in wartime.

Not surprisingly, exactly the same set of arguments and slogans is deployed by Justice Thomas in his lone dissent in ***Hamdi v. Rumsfeld***,[22] arguing that the President needed no statutory authority to detain indefinitely those he determined to be enemy combatants in the war on terror and that any attempt by Congress to cut into that

[21] 2 ENGAGE at 12,
[22] 124 S.Ct. 2633, 2674-85 (2004)(dissenting opinion).

authority would unconstitutionally invade the core of presidential powers. Such is the unitary executive theory, capable of yielding all sorts of results deeply inimical to a constitutional democracy. Given the tight intertwining of the Scalia dissent in ***Morrison;*** the Thomas dissent in ***Hamdi;*** the seedbed of this revolutionary and remarkably simple set of ideas in the work of the OLC in 1986-90 under President Reagan; the role of Judge Alito in that OLC and one supposes, perhaps, in its remarkable opinions such as 10 OLC 159; and Samuel Alito's striking endorsement of the Scalia dissent both in 1989 and in 2000, where the endorsement was accompanied by a mini-lecture on how the theory operates, it is difficult not to suppose that this version of "Unitarianism" will not frame and color a Justice Alito's perception of, and approach to, separation of powers issues and the kinds of issues surrounding unilateral executive abuse that are now rocking the nation. Nothing could be more important than to ventilate this "dark side" of the otherwise bright and sunny Alito disposition and legacy. I hope the questioning of the nominee will do so.

And a final word of caution about the easy "out" of respect for precedent[23], which every nominee seems to employ as a magic elixir, applying the well-worn formulas of ***stare decisis*** for deciding how much weight to give to precedent and when to consider overruling, formulas that any nominee with half a brain could recite in his sleep and that every nominee of either party and wherever located on the left/right spectrum would recite in almost exactly the same way. I call it a distraction because, like the fakeout

[23] Cardozo, I believe, wrote: "To determine to be loyal to precedents does not carry us far upon the road. Precedents and principles are complex bundles. It is well enough to say we shall be consistent, but consistent with what?"

moves of a practiced magician, getting people to play the "will he vote to overrule" game keeps them from thinking seriously about what the record — as supplemented to some as yet uncertain degree by light the nominee's testimony sheds on that record — ***already*** tells us about the way Samuel Alito looks at, interprets, understands, and is proud of having applied, the core concepts of equal liberty and checks and balances that are the pillars of our constitutional democracy.